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Supreme Court of the United States

OCTOBER TERM, 1977

No. ~~77-~~ 1022

ARTHUR KRAUSE, *et al.*,

Cross-Petitioners,

—v.—

JAMES A. RHODES, *et al.*,

Cross-Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

SANFORD J. ROSEN

155 Montgomery Street, #1502
San Francisco, CA 94104

NICHOLAS B. WARANOFF

NELSON G. KARL

DAVID ENGDAHL

MICHAEL E. GELTNER

AMITAI SCHWARTZ

BRUCE J. ENNIS

ROBERT P. APP

Attorneys for Cross-Petitioners

of Counsel

ANDREA L. BIREN

ANN SAYVETZ

ROBERT S. BAKER

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IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1977

NO.

ARTHUR KRAUSE, et al.,
Cross-Petitioners,
vs.
JAMES A. RHODES, et al.,
Cross-Respondents.

CONDITIONAL CROSS-PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The cross-petitioners^{1/} pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, filed September 12, 1977, ordering that the First Amendment claim of plaintiffs be dismissed. The cross-petitioners pray that the writ should issue only in the event this Court should grant the petition(s) for certiorari filed by the cross-respondents at this time.

1/ Cross-petitioners, all thirteen plaintiffs below, are Arthur Krause, Elain B. Miller, Sarah Scheuer, Louis A. Schroeder, John R. Cleary, Donald MacKenzie, Douglas Wrentmore, Thomas M. Grace, James D. Russell, Alan M. Canfora, Dean Kahler, Robert F. Stamps, and Joseph Lewis, Jr.

Cross-respondents are James Rhodes, Governor of the State of Ohio; Sylvester Del Corso, Adjutant General of the Ohio National Guard; Robert H. Canterbury, Assistant Adjutant General of the Ohio National Guard; Charles E. Fassinger, Lieutenant Colonel of the Ohio National Guard; Harry D. Jones, Major of the Ohio National Guard; Raymond J. Srp, Captain of the Ohio National Guard; John E. Martin, Captain of the Ohio National Guard; James R. Snyder, Captain of the Ohio National Guard; Alexander D. Stevenson, Lieutenant of the Ohio National Guard; Howard R. Fallon, Lieutenant of the Ohio National Guard; Dwight G. Cline, Lieutenant of the Ohio National Guard; SFC Okey Flesher; SSG Myron Pryor; SSG Barry Morris; SGT Lawrence Shafer; SGT Richard Love; SGT Mathew McManus; SGT (acting) William Herschler; SP4 James McGee; SP4 William Perkins; SP4 James Pierce; SP4 Lloyd Thomas; SP4 Ralph Zoller; SP4 Robert D. James; SP4 Russell Repp, Jr.; SP4 Leon Smith; PFC Rodney Biddle; and PFC Larry Mowrer.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reversing the judgment of the United States District Court for the Northern District of Ohio and remanding for new trial, is reported at F.2d, and is set forth as Appendix A attached hereto. There is no written memorandum of the District Court's denial of cross-petitioners' motion for directed verdict on their First Amendment claim. The transcript of that denial in open court on August 20, 1975, is attached hereto as Appendix B. The District Court's order dated September 25, 1975, denying cross-petitioners' motion for judgment notwithstanding the verdict and for new trial is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 12, 1977. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 20, 1977. This cross-petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether students at Kent State University had a First Amendment right to engage in peaceful political protest on campus, notwithstanding the fact that there were disorderly assemblies on prior days?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

United States Constitution, Amendment I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1, provides, in pertinent part:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Regulation promulgated by the Governor of Ohio, the Ohio National Guard and Kent State University officials:

The Governor, through the National Guard, has assumed legal control of the campus and the City of Kent. As currently defined, the state of emergency has established the following:

1. prohibited all forms of outdoor demonstrations and rallys [sic] - peaceful or otherwise; ...

STATEMENT OF THE CASE

This lawsuit was brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment, and also asserts pendent state claims. It concerns the dispersal of a peaceful assembly protesting the Cambodian incursion and the killings and woundings of students on the Kent State University campus on May 4, 1970. Kent State University is operated by the State of Ohio.

PROCEDURAL HISTORY

The cross-petitioners, who were plaintiffs below, are the nine wounded students (or, where appropriate, their parents as guardians ad litem) and the personal representatives of the estates of the four students who were killed. They filed the individual actions in the United States District Court for the Northern District of Ohio seeking compensatory and punitive damages, alleging deprivations of civil rights under the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983, and alleging pendent claims based upon negligence, assault and wrongful death.

The cross-respondents, who were defendants below, are the Ohio National Guardsmen who fired a thirteen-second fusillade into the crowd of students; their officers at the scene; the Adjutant General and the Assistant Adjutant General of the Ohio National Guard; and the Governor of Ohio.

On June 2, 1971, the District Court dismissed the original complaints by the Krause, Miller and Scheuer estates under Rule 12(b), Fed.R.Civ.Proc., on grounds of sovereign and official immunity. On November 17, 1972, a panel of the Sixth Circuit Court of Appeals, by a divided vote, affirmed the dismissals. 471 F.2d 430. This Court unanimously reversed and remanded the actions for further proceedings. Scheuer v. Rhodes, 416 U.S. 232 (1974).

Upon remand to the District Court, all thirteen cases were consolidated for trial.^{2/} The consolidated cases were tried, only on the issue of liability, before the Hon. Don J. Young and a jury. Trial commenced May 19, 1975.

On August 18, 1975, at the close of defendants' case, plaintiffs moved for a directed verdict on the issue of the defendants' unlawful dispersal of a peaceful assembly of students shortly preceding the shootings.^{3/} This motion was denied in open court on August 20, 1975.^{4/}

General jury verdicts for all defendants were returned on August 27, 1975.^{5/}

2/ 1 App. 26 (Doc. No. 48, Order of August 27, 1974).^{2A/}

2A/ A reference to the Appendix to the Briefs in the Court of Appeals is cited as App.[page], lines to . The Record Reference is cited as (Tr. [page]). An Exhibit in the Court of Appeals is identified as to party: Plaintiffs (PX__); Defendants (DX__); and Trial Court (CtX__).

The Appendices to this conditional cross-petition are cited as App.A [page]; App.B [page]; and App.C [page].

3/ 1 App. 175 (Doc. No. 334, Plaintiffs' Motion for Directed Verdict on the Issue of Unlawful Dispersal).

4/ 8 App. 3755, lines 14-18 (Tr. 12,003).

5/ 1 App. 210 (Doc. No. 341).

Judgment was entered on September 2, 1975.^{6/} By stipulation, the parties had agreed that a verdict by nine of the twelve members of the jury would be sufficient.^{7/} Only nine of the jurors voted for the defendants.

Plaintiffs moved orally and in writing for judgment notwithstanding the verdict and for new trial.^{8/} By an Order dated September 25, 1975, the District Court denied the plaintiffs' motion.^{9/} Plaintiffs' notice of appeal was filed on October 24, 1975.^{10/}

On September 12, 1977, a panel of the Court of Appeals for the Sixth Circuit rendered judgment, vacating the judgments for the defendants because of abuse of discretion by the District Court in handling a jury intrusion. The case was remanded for new trial. However, the Court of Appeals also directed that upon another trial, the First Amendment claim of plaintiffs will not be in issue.

6/ 1 App. 223 (Doc. No. 342).

7/ 1 App. 27 (Doc. No. 117, Pretrial Order, January 29, 1975).

8/ 8 App. 4071 to 4075 (Tr. 12,576 to 12,580); 1 App. 236 (Doc. No. 343, September 12, 1975).

9/ 1 App. 249 (Doc. No. 347).

10/ 1 App. 251 (Doc. No. 349).

The Court of Appeals based its holding on the First Amendment claim on the violence of May 1-3.

We conclude from the uncontradicted evidence of three successive days of violence involving students and other young people that the defendants satisfied the "heavy burden" of justifying their decision to permit no assemblies on the Kent State campus on May 4, 1970. Healy v. James, supra, 408 U.S. at 184.

App.A, 14a.

The Court of Appeals dismissed the First Amendment claim because it found that the absolute ban was a justified prior restraint. Thus, the Court of Appeals never reached the issue of the peacefulness of the rally on the Commons on May 4th; there remained for the Court of Appeals and for the District Court on re-trial no triable issue of fact.

FACTUAL HISTORY

A. Friday, May 1st.

Two peaceful assemblies of students protesting the Cambodian incursion occurred on the Kent State campus, without incident, on Friday, May 1.^{11/}

11/ E.g., 5 App. 2126, line 1 to 2128, line 9 (Tr. 7383 to 7385).

Disorder in the area of the several taverns off campus in downtown Kent late Friday evening and into the early hours of Saturday morning, May 2, led Kent Mayor Leroy Satrom to invoke emergency provisions of the City ordinances. 12/ The emergency provisos of the City of Kent ordinances did not apply to the campus.

There is no evidence that any of the plaintiffs was involved in these disturbances. There is no evidence that any disorders occurred in the campus area during that time.

B. Saturday, May 2nd.

Late in the afternoon of May 2, after consulting extensively with a National Guard officer, Mayor Satrom placed a telephone call to the Governor's office and requested that National Guard troops be sent to the City of Kent.13/

The National Guard troops did not arrive in the City of Kent until late evening,14/ when a fire at the ROTC building on the campus had almost burned out. Few people were active in the destruction of

12/ 7 App. 3399, line 23 to 3401, line 6 (Tr. 10,694 to 10,696).

13/ 7 App. 3408, lines 10-23 (Tr. 10,703); 7 App. 3439, lines 8-25 (Tr. 10,782).

14/ 6 App. 2808, lines 24-25 (Tr. 8950); 6 App. 2809, lines 1-4 (Tr. 8951).

the building,15/ although there was a crowd of on-lookers. The ROTC fire was the immediate occasion for the entry of Ohio National Guardsmen onto the campus. No plaintiff was ever implicated in the unlawful destruction of the building.

C. Sunday, May 3rd.

(1) The first meeting at the firehouse and the press conference.

On the morning of Sunday, May 3, 1970, there was a meeting at about 10:00 a.m. in the Kent firehouse. Present, among others, were defendants Rhodes and Del Corso, Mayor Satrom of Kent, Colonel Chiaramonte of the Ohio Highway Patrol, and several University vice presidents.16/ The meeting was in two portions, the first being an informal session in which groups of people discussed the events of the previous evening and plans for the future.17/ The second portion of the meeting consisted of a formal press conference, chaired by defendant Rhodes.18/

At the first portion of the meeting, defendant Rhodes formally established control over the State University campus in

15/ 2 App. 816, lines 13-23 (Tr. 1024).

16/ 5 App. 2129, lines 6-10 (Tr. 7389); 6 App. 2710, line 22 to 25 (Tr. 8849); 6 App. 2711, lines 1-6 (Tr. 8850); 7 App. 3415, lines 16-25 (Tr. 10,713); 7 App. 3416, line 1 (Tr. 10,714).

17/ 6 App. 2805, lines 6-21 (Tr. 8947).

18/ 6 App. 2805, lines 19-21 (Tr. 8947); 7 App. 3416, lines 14-21 (Tr. 10,714).

himself, as delegated to the National Guard. He indicated to the University administrators present that they should "stay out of it," by which he was referring to control of assemblies and other such activities on campus.19/

At the informal session, Rhodes directed that the National Guard were to use any necessary force to disperse any meetings or gatherings of students,20/ declaring that "he didn't want to see any two students walking together."21/ There is also evidence that during the portion of the meeting preceding the press conference, defendant Rhodes said that "while he was governor of the State of Ohio, the campus would remain open" and "that he intended to keep the classrooms open if it meant keeping an armed guard in each classroom."22/

19/ 5 App. 2129, line 6 to 2130, line 21 (Tr. 7389 to 7390); 5 App. 2158, lines 2-12 (Tr. 7422); 6 App. 2806, line 16 to 2807, line 15 (Tr. 8948 to 8949); 6 App. 2811, line 8 to 2812, line 12 (Tr. 8977 to 8978).

20/ 6 App. 2815, lines 3-8 (Tr. 9006).

21/ 6 App. 2811, line 13 to 2812, line 12 (Tr. 8977 to 8978).

22/ 6 App. 2806, line 16 to 2807, line 15 (Tr. 8948 to 8949); 6 App. 2811, line 13 to 2812, line 12 (Tr. 8977 to 8978).

After the informal meeting, the press conference took place.23/ Rhodes referred to the people who disrupted the campus and burned the ROTC building as "worse than the Brown Shirts and the Communist elements and also the Night Riders and Vigilantes."24/

At the press conference, defendant Rhodes declared that it was his policy to disperse crowds, saying:

Let me assure everyone that there is no place off limits, and we are going to disperse crowds.25/

He added:

Let me say this: That if they can intimidate and threaten, jolt the merchants of this community and other people, no one is safe in Portage County. It's just that simple. No one is safe and I do not believe that people understand the seriousness of these individuals organized in a revolutionary frame of mind, believe me.26/

23/ 6 App. 2718, line 19 to 2719, line 2 (Tr. 8856 to 8857).

24/ 6 App. 2752, lines 6-18 (Tr. 8890); CtX 2.

25/ CtX 2.

26/ CtX 2.

(2) The Matson-Frisina communication.

In reliance on what he himself had heard Governor Rhodes say, Robert Matson, Kent State Vice President for Student Affairs, drafted a communication, signed by himself and student body President, Frank Frisina, which notified the student body of the assembly ban.^{27/} The Matson-Frisina communication, which bore the date May 3, 1970, stated in pertinent part:

The Governor, through the National Guard, has assumed legal control of the campus and the city of Kent. As currently defined the state of emergency has established the following:

1. prohibited all forms of outdoor demonstrations and rallies[sic]--peaceful or otherwise;...^{28/}

(3) Dispersal of student assemblies on Sunday evening, May 3rd.

On the evening of Sunday, May 3, 1970, a large group of people assembled on the edge of the campus.^{29/} This group

^{27/} 9 App.Ex. 130x (DX IG); 5 App. 2501, line 18 to 2502, line 21 (Tr. 8492 to 8493).

^{28/} 9 App.Ex. 130x (DX IG).

^{29/} 7 App. 3419, lines 1-10 (Tr. 10,717).

was not in violation of any campus curfew, since Mayor Satrom's 8:00 p.m. curfew for the City of Kent had been amended to permit persons to be on campus until 1:00 a.m.^{30/} This fact had been communicated to the students in a portion of the Matson-Frisina communication of May 3, which provided:

3. A Curfew is in effect for the city from 8 P.M. to 6 A.M. and an on-campus curfew of 1:00 A.M. has been ordered by the National Guard.^{31/}

Sometime during the evening of May 3, 1970, a National Guard officer determined to impose either the curfew or assembly ban on the assembled persons and caused the "riot act" to be read ordering dispersal of some people on the campus.^{32/} When the people failed to disperse, troops, including some of the defendants, marched into the gathering with their bayonets bared and inflicted bodily injury upon at least one person.^{33/}

^{30/} See 9 App.Ex. 130x (DX IG).

^{31/} 9 App.Ex. 130x (DX IG).

^{32/} 5 App. 2118, lines 14-18 (Tr. 7344).

^{33/} 5 App. 2002, line 1 to 2005, line 4 (Tr. 6897 to 6900).

D. Monday, May 4th.

- (1) The second meeting at the firehouse and the decision to continue to disperse student assemblies.

On the following morning, May 4, 1970, another meeting was held in the Kent firehouse.^{34/} Present at the meeting were defendant Canterbury, Dr. White, Mayor Satrom, Kent Police Chief Thompson, Kent State University Vice Presidents Matson and Dunn, Kent City Attorney Hart, Portage County Sheriff Hegedus, and members of the Ohio Highway Patrol.^{35/}

A rumor that a gathering of students was to take place on campus at about noon was one of the topics of discussion.^{36/} Defendant Canterbury convened, chaired and dominated the meeting.^{37/} He stated that the ban on assemblies in force on the

^{34/} 5 App. 2429, lines 12-14 (Tr. 8310); 7 App. 3422, line 4 to 3423, line 3 (Tr. 10,720 to 10,721).

^{35/} 6 App. 2608, lines 15-18 (Tr. 8744); 6 App. 2611, line 19 to 2612, line 1 (Tr. 8747 to 8748); 7 App. 3422, line 4 to 3423, line 3 (Tr. 10,720 to 10,721).

^{36/} 5 App. 2497, lines 13-20 (Tr. 8482); 6 App. 2548, line 24 to 2549, line 10 (Tr. 8656 to 8657); 7 App. 3431, lines 1-3 (Tr. 10,728).

^{37/} 5 App. 2531, line 11 to 2532, line 17 (Tr. 8633 to 8634); 7 App. 3362, lines 10-22 (Tr. 10,594).

previous day would continue to be enforced.^{38/} A "consensus" was reached to the effect that the assembly should be dispersed.^{39/}

(2) The student assembly.

Sometime after 11:00 a.m. people began to gather around the victory bell on the Commons, an open grassy area in the center of campus. The area of this gathering was a traditional area for peaceful gatherings and meetings on campus^{40/} and, indeed, on Friday, May 1, 1970, a peaceful meeting had been held in this area without incident.^{41/}

On May 4, 1970, this area was the center of the campus and its activities. Hence, large congregations of students frequently occurred, especially at lunch time and during breaks between class hours.^{42/}

The uncontested evidence demonstrated that the May 4 assemblies which occurred

^{38/} 5 App. 2498, lines 12-19 (Tr. 8483).

^{39/} 5 App. 2432, lines 15-22 (Tr. 8317); 7 App. 3363, lines 12-18 (Tr. 10,595).

^{40/} 2 App. 677, lines 7-10 (Tr. 463); 3 App. 967, line 25 to 968, line 4 (Tr. 1961 to 1962); 5 App. 2076, lines 1-6 (Tr. 7190).

^{41/} 5 App. 2126, line 1 to 2128, line 9 (Tr. 7383 to 7385).

^{42/} 2 App. 677, lines 7-10 (Tr. 463) 5 App. 2076, lines 1-6 (Tr. 7190).

at the noon lunch hour, a time when students naturally congregated on the Commons, were wholly peaceful. A holiday or festive air prevailed on that sunny spring day.^{43/} Nevertheless, defendant Canterbury, carrying out defendant Rhodes' press conference statement and the decision reached at the firehouse meeting earlier that morning, issued orders to his staff that the rally was unlawful and should not be permitted to take place, whether peaceful or not.^{44/}

(3) Dispersal of the student assembly.

At the direction of defendant Canterbury, campus patrolman Harold Rice ordered the persons assembled at the victory bell to disperse.^{45/}^{46/}

When the victory bell crowd did not disperse in response to this order, defendant Jones told Canterbury that the order could not be heard by the crowd, whereupon

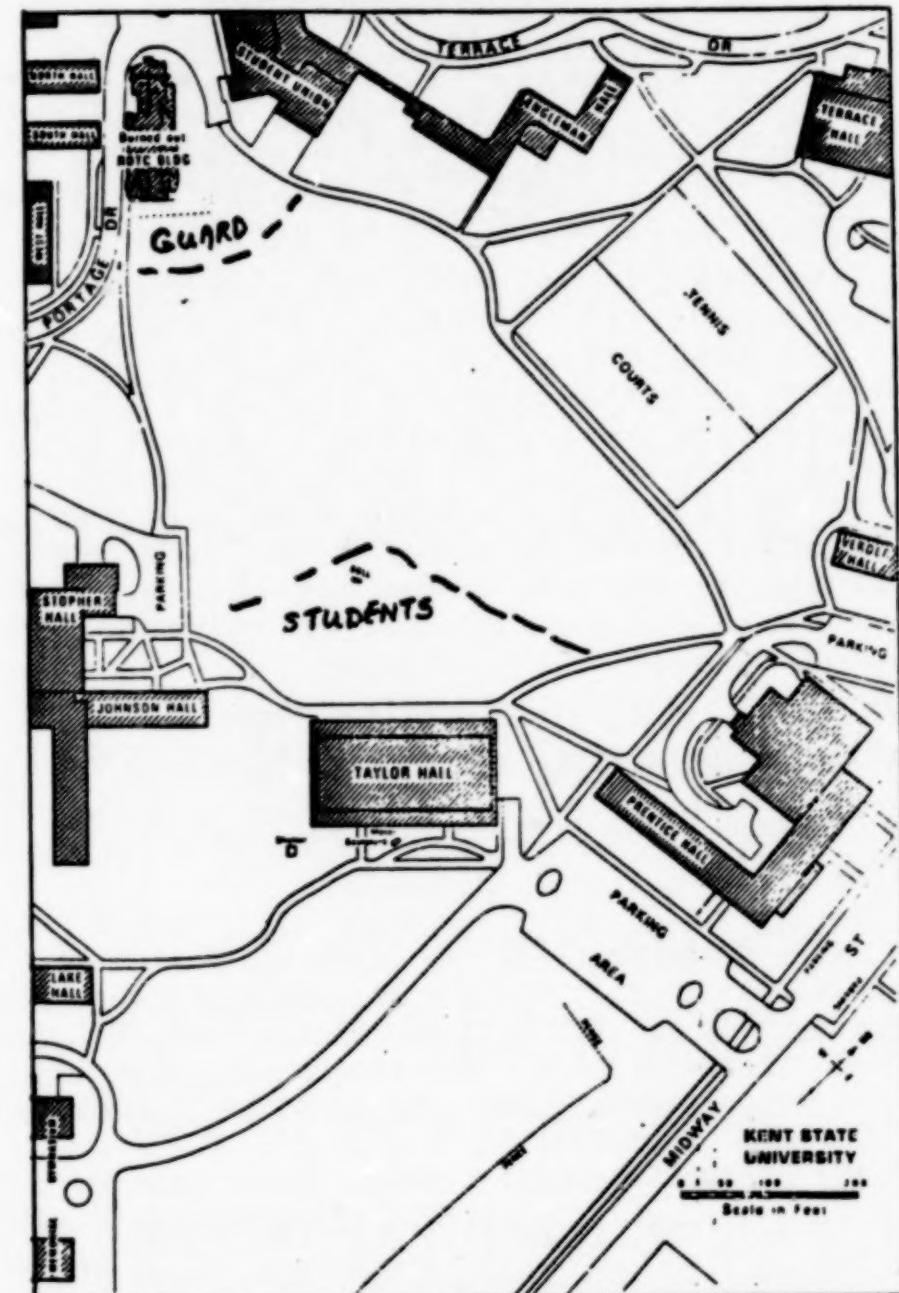
43/ 5 App. 2222, lines 4-15 (Tr. 7714).

44/ 5 App. 2060, lines 6-10 (Tr. 7119); 5 App. 2121, lines 13-17 (Tr. 7350); 5 App. 2449, lines 7014 (Tr. 8335); 5 App. 2457, lines 1-4 (Tr. 8351).

45/ 5 App. 2175, lines 15-25 (Tr. 7574); 5 App. 2458, line 19 to 2459, line 9 (Tr. 8352 to 8353).

46/ On the next page of this petition is a copy of a map of the Commons area, which is in evidence as PX 54002. On this map we have indicated the locations of the National Guard and of the students at the point in time of the order to disperse.

MAP OF COMMONS AREA WITH LOCATION OF GUARD AND STUDENTS



PX 54002

Canterbury told Patrolman Rice and some Guardsmen to approach the crowd in the jeep and repeat the order to disperse.^{47/} Two Guardsmen rode in the back of the jeep as it carried Patrolman Rice back and forth nearer the crowd.^{48/} At one point, the jeep was driven directly at or into the crowd in pursuit of one particular person.^{49/} The movement of the jeep prompted isolated instances of rocks being thrown at the jeep.^{50/} In addition, there was shouting and gesturing.^{51/} The students did not disperse. Even after the jeep episode, the activities of crowd members were limited to verbalizations and gestures, with little or no rock throwing once the jeep had returned to Guard lines.^{52/} The numerous photographs of the crowd during

^{47/} 5 App. 2181, lines 5-12 (Tr. 7581); 5 App. 2460, line 19 to 2461, line 1 (Tr. 8354 to 8355).

^{48/} 5 App. 2176, line 18 to 2180, line 18 (Tr. 7576 to 7580).

^{49/} 5 App. 2183, lines 1-6 (Tr. 7583).

^{50/} 2 App. 759, lines 18-24 (Tr. 673); 5 App. 2180, lines 6-13 (Tr. 7580).

^{51/} 2 App. 681, line 21 to 682, line 6 (Tr. 474 to 475).

^{52/} 2 App. 592, lines 1-15 (Tr. 196); 2 App. 593, lines 7-10 (Tr. 197); 2 App. 801, lines 10-24 (Tr. 941); 3 App. 969, lines 1-7 (Tr. 1963).

this period confirm these facts.^{53/}

There is remarkable agreement with regard to the assembled persons' activities before the jeep entered the Commons. The evidence is uniform--including testimony of some defendants--that, prior to the dispersal, the assembly was peaceful and people were not engaged in any violent or threatening activities.^{54/}

When the jeep had returned and the students had not dispersed, defendant Canterbury decided to fire tear gas with grenade launchers,^{55/} and Major Jones gave the order.^{56/} The tear gas only partially dispersed the victory bell assembly, and it provoked more shouts and gestures. Yet, except for the throwing of a few rocks and tear gas cannisters, no violent or aggressive behavior on the part of the crowd took

^{53/} See 10 App.Photo 10p to 69p; 10 App.Photo 178p to 181p; 2 App. 582 to 591 (Tr. 186 to 195, testimony of photographer Ruffner).

^{54/} 3 App. 1214, lines 10-24 (Tr. 3197) (Pryor). 3 App. 992, lines 7-18 (Tr. 2069) (Thomas). 2 App. 901, line 23 to 902, line 1 (Tr. 1330 to 1331) (Shaffer). 3 App. 1112, lines 6-17 (Tr. 2668) (Mowrer). 5 App. 2222, lines 4-15 (Tr. 7714) (Simons). 6 App. 2810, lines 4-10 (Tr. 8965) (Delaney).

^{55/} 5 App. 2064, lines 5-15 (Tr. 7161); 5 App. 2066, lines 13-18 (Tr. 7163).

^{56/} 3 App. 1213, lines 3-7 (Tr. 3196); 5 App. 2468, lines 22-24 (Tr. 8366).

place.57/

Troops moved out in formation to disperse the people remaining near the victory bell.58/

The line of troops moved forward, causing the students to move out of the Commons and up the hill toward Taylor Hall.59/ By the time the troops took positions on either side of Taylor Hall, the gathering on the Commons had been effectively dispersed.60/

(4) Prelude to the shooting.

Instead of stopping once the students had been dispersed from the Commons, Company A and Troop G marched down Blanket

57/ 2 App. 761, lines 18-20 (Tr. 677); 2 App. 787, line 25 to 788, line 13 (Tr. 838 to 839); 2 App. 802, line 15 to 803, line 25 (Tr. 944 to 945).

58/ 5 App. 2064, line 22 to 2065, line 2 (Tr. 7161 to 7162); 5 App. 2066, lines 1-9, 19-24 (Tr. 7163); 5 App. 2456, lines 11-16 (Tr. 8348); 5 App. 2530, line 22 to 2531, line 10 (Tr. 8632 to 8633).

59/ 5 App. 2068, line 3 to 2070, line 12 (Tr. 7166 to 7168); 5 App. 2469, line 16 to 2470, line 10 (Tr. 8367 to 8368).

60/ 3 App. 1218, lines 13-21 (Tr. 3227); 3 App. 1219, lines 12-21 (Tr. 3228); 5 App. 2067, line 25 to 2073, line 9 (Tr. 7165 to 7171).

Hill, shooting tear gas cannisters.61/

After the troops marched down to the Practice Field, some knelt pointing their weapons towards the Prentice Hall parking lot.62/ The troops then marched back up Blanket Hill, at the crest of which an order was given to stop and turn to face the practice field.63/

(5) The unjustifiable shooting.

After several seconds, some of the troops opened fire, in a continuous barrage lasting thirteen seconds.64/ The barrage killed four students and wounded nine others.

61/ 3 App. 1222, lines 23-24 (Tr. 3234); 5 App. 2085, lines 5-6 (Tr. 7206).

62/ 2 App. 905, lines 5-13 (Tr. 1352); 3 App. 1223, lines 13-16 (Tr. 3235); 3 App. 1224, lines 16-25 (Tr. 3237); 3 App. 1225, lines 18-21 (Tr. 3242); 3 App. 1229, lines 3-11 (Tr. 3260); 3 App. 1421, lines 12-19 (Tr. 4489).

63/ 3 App. 976, line 6 to 977, line 18 (Tr. 2042 to 2043); 3 App. 1156, lines 14-17 (Tr. 2856); 3 App. 1157, lines 7-9 (Tr. 2857); 3 App. 1167, line 18 to 1168, line 5 (Tr. 2881 to 2882).

64/ 3 App. 1029, line 25 to 1030, line 5 (Tr. 2335 to 2336); 3 App. 1167, line 14 to 1168, line 5 (Tr. 2881 to 2882); 4 App. 1703, lines 15-23 (Tr. 5436); 4 App. 1717, lines 11-12 (Tr. 5472).

Although a mass of students was standing on the veranda of Taylor Hall, not far from the firing line,^{65/} virtually all of the National Guard gunfire was directed northeast down Blanket Hill toward the parking area.^{66/} The only victim near the veranda was plaintiff Lewis, who was at least 60 feet from the firing line.^{67/} Plaintiff Russell was the only victim of the gunfire not located in that direction from the firing line. He was at least 160 feet away, to the south-southeast.^{68/}

Two of the victims--Cleary^{69/} and Lewis^{70/}--were within 100 feet of the firing line. Three of the victims--

^{65/} 2 App. 772, lines 21-25 (Tr. 712); see PX 47040.

^{66/} 2 App. 776, lines 18-24 (Tr. 719); 2 App. 777, line 3 to 784, line 1 (Tr. 720 to 727); 7 App. 3549, line 11 to 3550, line 2 (Tr. 11,102 to 11,103); 8 App. 3657, line 20 to 3659, line 1 (Tr. 11,501 to 11,503).

^{67/} 2 App. 924, lines 15-25 (Tr. 1558); see PX 47041.

^{68/} 3 App. 1295, lines 8-11 (Tr. 3582).

^{69/} 2 App. 610, lines 6-19 (Tr. 282); 3 App. 1384, lines 18-20 (Tr. 4281).

^{70/} 2 App. 611, line 13 to 612, line 2 (Tr. 283 to 284); 2 App. 924, lines 15-25 (Tr. 1558).

Grace,^{71/} Russell^{72/} and Canfora^{73/}-- were between 100 and 200 feet from the firing line. Two of the victims--Miller, who was killed,^{74/} and Kahler, who was paralyzed from the waist down^{75/}--were between 200 and 300 feet from the firing line. The three remaining fatalities--Scheuer,^{76/} Schroeder^{77/} and Krause^{78/}--were between 300 and 350 feet from the firing line, as was Wrentmore.^{79/} Two of the victims--Stamps^{80/} and MacKenzie^{81/}--were at least 500 feet from the firing line, toward the far end of the parking area.

^{71/} 3 App. 1281, line 19 to 1282, line 2 (Tr. 3435 to 3436).

^{72/} 3 App. 1295, lines 8-11 (Tr. 3582).

^{73/} 3 App. 1308, line 25 to 1309, line 15 (Tr. 3697 to 3698).

^{74/} 3 App. 1284, lines 6-23 (Tr. 3449); 5 App. 2006, lines 23-25 (Tr. 6904); 5 App. 2013, lines 6-19 (Tr. 6920).

^{75/} 2 App. 870, lines 15-17 (Tr. 1184).

^{76/} 4 App. 1995, lines 5-9 (Tr. 6856).

^{77/} 5 App. 2015, lines 15-18 (Tr. 6923).

^{78/} 5 App. 2014, lines 13-16 (Tr. 6921).

^{79/} 3 App. 1137, lines 23-24 (Tr. 2760).

^{80/} 3 App. 1041, lines 9-13 (Tr. 2402).

^{81/} 3 App. 1019, lines 20-23 (Tr. 2148).

None of the victims was armed or constituted a threat to any Guardsmen.

REASONS FOR GRANTING THE WRIT

Since this case has been remanded to the District Court for new trial, the First Amendment issue is not fundamental enough to warrant an independent petition for certiorari at this time. As the Court of Appeals said:

These cases essentially present the question of whether excessive force was employed in attempting to deal with a civil disturbance. Both the due process claims and the pendent state claims are concerned with the basic issue of the appropriateness of the response of state officials and National Guard members to the conditions which existed and developed at the May 4th noon assembly on the Kent State campus.

App.A, 18a.

The plaintiffs agree that the issues raised by the killings and woundings are the core of the case. Although the First Amendment issue is important as an unsettled question and to the justice of plaintiffs' cause, a further delay for review by this Court is

not in the best interests of the plaintiff.^{82/} They wish to proceed forthwith to re-trial of the case, even as delineated by the Court of Appeals.

But if the Court determines to grant the petition(s) of cross-respondents filed at this time, cross-petitioners believe that the Court should review the entire case and correct the plain error of the court below with respect to the dismissal of the First Amendment claim. Accordingly, cross-petitioners are filing this conditional cross-petition.^{83/}

82/ Cross-petitioners assume that it would be possible for such a petition on the First Amendment issue to be filed after a new trial and second appeal, if cross-petitioners do not prevail on other grounds. Brotherhood of Locomotive Engineers v. Bangor & Aroostook R.R., 389 U.S. 327 (1967); Urie v. Thompson, 337 U.S. 163 (1949).

83/ See Stern, When to Cross-Appeal or Cross-Petition--Certainty or Confusion? 87 Harv.L.Rev. 763 (1973-1974). Stern suggests the use of a conditional cross-petition in a case such as the case at bar.

In Upholding the Absolute Ban on Assemblies, The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by this Court.

Certiorari should be granted to decide the important and unsettled question whether a university may totally ban political protest demonstrations following disorders on previous days. The Court of Appeals decided that such a total ban was allowable, and in so doing, departed from settled precedent, Due Process and First Amendment interests. By so holding, the Court of Appeals, by implication, held that it was not necessary for the university, or the Governor, to consider narrower alternatives that would not impinge on protected First Amendment rights. Thus the Court of Appeals never reached the issue of the constitutionality of the application of this ban to the peaceful assembly of May 4th.

In reaction to disturbances in the city of Kent and the burning, by a few people, of the ROTC building on campus, defendants imposed an absolute ban on all rallies and demonstrations for whatever purpose, at any time of the day or night, on the campus of a state university whose students were in residence and whose instruction program was in operation. The ban was then applied to a peaceful assembly conducted at the traditional meeting place on campus, which is between classroom buildings. The assembly was conducted at noon, a time when students necessarily came together between classes to talk and eat lunch. Plaintiffs contend this ban was an unjustified, overbroad prior restraint on protected First Amendment political expression in a wholly proper place, at a wholly proper time for such activity.

This is a case of great national importance concerning First Amendment political expression at a state university.

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools.' Shelton

v. Tucker, 364 U.S.
479 . . . (1960)

Healy v. James, 408 U.S.
169, 180-81 (1972).

Cf. DeJonge v. Oregon, 299 U.S. 353, 364-365 (1937).

The Kent State shootings marked a turbulent time in our nation's history. The students killed and wounded at Kent State were protesting an illegal government act, the incursion into Cambodia. Plaintiffs submit they were denied their First Amendment rights, killed or wounded by further unlawful government acts.

The threshold issue in this case is whether the ban on assemblies was an unjustified prior restraint. The ban suppressed in advance all rallies and demonstrations. Lovell v. Griffin, 303 U.S. 444 (1938); Hague v. CIO, 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Thomas v. Collins, 323 U.S. 516 (1945). See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Freedman v. Maryland, 380 U.S. 51 (1965); Southeastern Productions Ltd. v. Conrad, 420 U.S. 546 (1975); National Socialist Party v. Village of Skokie, U.S. 53 L.Ed.2d. 90 (1977). It was clearly a prior restraint. Moreover, this ban fails to meet its "heavy burden" of justification for a prior restraint, facially and as applied, because the past acts relied upon were those of other people in other places. See Organization for a Better Austin v. Keefe, 402

U.S. 415, 418-19 (1971); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 180-81 (1968); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Near v. Minnesota, 384 U.S. 697 (1931).

The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law; a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.
(Citation omitted)

Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).

Thus, the decision of the Court of Appeals is in direct contradiction to this Court's decisions. This total ban cannot be justified by the previous disorders.

Furthermore, in cases arising in contexts other than a college campus, this Court has held that such prior

restraints on First Amendment freedoms not only must be justified, but must be narrowly tailored to conform to a legitimate government interest without unnecessarily impinging on protected First Amendment rights. See e.g. Nebraska Press Association v. Stuart, 427 U.S. 539, 568 (1976); Erznoznik v. Jackson, 422 U.S. 205 (1975); Thomas v. Collins, 323 U.S. 516 (1945); Lovell v. Griffin, 303 U.S. 444 (1938). Nebraska Press Association suggests that less restrictive alternatives must be considered and discarded as unworkable before a prior restraint on expression can be justified. 427 U.S. at 563. Narrower time, place and manner restrictions would be considered alternatives. Cf. e.g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

It appears that the court below in the instant case did not apply this form of the Overbreadth Doctrine because it held that the ban was a justified prior restraint under the test fashioned in Brandenburg v. Ohio, 395 U.S. 444 (1969). The expression prohibited, the Court implied, was directed at "inciting or producing imminent lawless action and [was] likely to incite or produce such action." 395 U.S. at 447. Even assuming arguendo that the ban was justified, the Court of Appeals failed to apply the second part of any test of a prior restraint: was the restraint the only alternative, or was a narrower restraint possible? Here, even peaceful assemblies at noon on the Commons were banned.

That is real and substantial overbreadth. Broadrick v. Oklahoma, 413 U.S. 601 (1973). Narrower restrictions could have protected the students' First Amendment rights as well as the legitimate government interest in order.

The extent of the application of the Overbreadth Doctrine to either ad hoc or pre-existing state university restrictions on First Amendment rights has never been decided by this Court.^{84/} ^{85/} In Grayned v. City of Rockford, 408 U.S. 104 (1972), the doctrine was applied to a statute restricting demonstrations outside of school buildings. The time, place and manner regulation of noise in Grayned was upheld in light of the standard for restriction

84/ This question has in fact showed its importance and recurrence at Kent State University itself. In October, 1977, another ban on assemblies was promulgated. A challenge to this ban will soon be filed in the Ohio Supreme Court. State ex rel Board of Trustees of Kent State University v. Jerry Alter, et al., dismissed, No. 803 (Ct. App., 11th App. Dist. of Ohio, November, 1977).

85/ This is also a matter of some conflict among the Circuits. Compare, e.g., Soglin v. Kaufman, 418 F.2d 163 (7th Cir. 1969), which applies the Overbreadth Doctrine, to Esteban v. Central Missouri State College, 415 F.2d 1077, (8th Cir. 1969), cert. den., 398 U.S. 945 (1970), which does not, in apparent agreement with the Sixth Circuit.

of First Amendment activity adopted in Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503 (1969).

Rockford's ordinance is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance,^{43/} Rockford punishes only conduct which disrupts or is about to disrupt normal school activities.

^{43/} See Jones v. Bd. of Regents, [436 F.2d 618 (9th Cir. 1970)] Hammond v. South Carolina State College [272 F.Supp. 947 (D.S.C. 1967)].

Grayned v. City of Rockford, 408 U.S. at 119

If, as this Court has said in Tinker, supra at 506, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," then this Court should decide whether the guardian of First Amendment rights, the Overbreadth Doctrine, follows those rights to school.^{86/}

^{86/} For further evidence of the importance and recurrence of these issues see, (Continued . . .)

Finally, this Court can and should review the facts in this case to assure that protected First Amendment activity remains protected. See, Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Cox v. Louisiana, 379 U.S. 536, 545 (1965); Jacobellis v. Ohio, 378 U.S. 184, 189 (1964); Pickering v. Bd. of Education, 392 U.S. 563 (1968); Old Dominion Br. No. 496, Nat'l Assn. of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974); Madison Joint Sch. Dist. v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976). If the prior restraint on rallies and demonstrations was an unjustified overbroad prior restraint, there remains the issue of fact as to the nature of the assembly on May 4, 1970.

Plaintiffs submit that the assembly on May 4, 1970, was a peaceful assembly. The evidence is virtually undisputed as to this fact; the Court of Appeals did not find to the contrary. Peaceful demonstrations are, of course, protected conduct. Edwards v. South Carolina, supra;

^{86/} (Cont.) Van Alstyne, The Student as University Resident, 45 Denver L.J. 582, 593 n.24 (1968); Wright, The Constitution on the Campus, 22 Vanderbilt L.R. 1027, 1043 (1969); Developments in the Law-Academic Freedom, 81 Harv.L.R. 1045, 1131 (1968); Note, Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison and Campus Contexts, 26 Stanford L.R. 855 (1974); Note, Bringing the Vagueness Doctrine on Campus, 80 Yale L.J. 1261 (1971).

Brown v. Louisiana, 383 U.S. 131 (1966); De Jonge v. Oregon, 299 U.S. 353 (1937). The assembly that day at noon on the commons was in no way disruptive to the normal activities of the school. Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 513 (1969); Healy v. James, 408 U.S. 169, 189 (1972). An assembly at that place and time, in a peaceful manner was a normal activity of the school. Nor was there incitement to imminent lawless action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Hess v. Indiana, 414 U.S. 105 (1973).

Plenary review of the record in the instant case will demonstrate, under these and other applicable decisions of this Court, the unconstitutionality of the ban on its face and as applied. Thus, plaintiffs were entitled to a directed verdict on their First Amendment causes of action. Plenary review is compelled by the pressing need to clarify the important and frequently recurring questions of constitutional law raised by this case. Therefore, if defendants' petition(s) for writ(s) of certiorari are granted, plenary review should also be granted of the First Amendment issues in the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the Petition(s) for Writ(s) of Certiorari submitted by defendants, this Conditional Cross-Petition for

a Writ of Certiorari should likewise be granted.

Respectfully submitted,

SANFORD JAY ROSEN
ROSEN, REMCHO & HENDERSON
155 Montgomery Street, #1502
San Francisco, CA 94104
Telephone: (415) 433-6830

NICHOLAS B. WARANOFF
JACOBS, SILLS & COBLENTZ
555 California Street
San Francisco, CA 94104
Telephone: (415) 391-4800

NELSON KARL
RUUD, KARL, SHEERER, LYBARGER
& CAMPBELL
33 Public Square, Suite 210
Cleveland, Ohio 44113

DAVID ENGDAHL
842 South Pearl
Denver, Colorado 80209
Telephone: (303) 753-2795

MICHAEL E. GELTNER
Georgetown Univ. Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 624-8297

AMITAI SCHWARTZ
N. Cal. Police Practices Project
814 Mission Street
San Francisco, CA 94103
Telephone: (415) 777-4880

BRUCE J. ENNIS
ACLU
22 East 40th Street
New York, New York 10016
Telephone: (202) 725-1222

ROBERT APP
ACLU of Ohio
203 E. Broad St., Suite 204
Columbus, Ohio 43215

Attorneys for Cross-Petitioners

ANDREA L. BIREN
ANN SAYVETZ
ROBERT S. BAKER

of Counsel

APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, ET AL.,
Plaintiffs-Appellants,
v.
JAMES A. RHODES, ET AL.,
Defendants-Appellees.

APPEAL from the
United States District
Court for the North-
ern District of Ohio,
Eastern Division.

Decided and Filed September 12, 1977.

Before: PHILLIPS, Chief Judge; EDWARDS and LIVELY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which PHILLIPS, Chief Judge, and EDWARDS, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 31-33) also delivered a separate concurring opinion.

LIVELY, Circuit Judge. In these consolidated cases damages were sought by nine persons injured and the personal representatives of four persons who were killed at Kent State University on May 4, 1970. The defendants were the Governor of Ohio, the president of the university and various officers and enlisted members of the Ohio National Guard. After a trial which lasted approximately 15 weeks the jury returned a verdict for all defendants and the plaintiffs have appealed.

This is the second appeal in the present case. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court reversed this court's affirmance of a judgment dismissing the complaints

on grounds that the defendants were entitled to immunity by reason of their official positions and that the Eleventh Amendment barred an action against the State of Ohio. The Supreme Court held that the complaints stated claims upon which relief may be granted and that the actions are not barred by the Eleventh Amendment. In its opinion the Supreme Court discussed the doctrine of executive immunity and its application in actions based on 42 U.S.C. § 1983 where it is claimed that state officials have misused power which they possess by reason of positions which clothe them with the authority of state law. In remanding the cases the Supreme Court defined the issues and the actions required of the trial court as follows:

The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

416 U.S. at 250

These cases have been exhaustively briefed and they were fully argued. Though many specific errors are claimed by the plaintiffs, they may fairly be grouped into five categories: (1) lack of substantial evidence to support the verdict, (2) violation of First Amendment rights as a matter of law, (3)

numerous errors in evidentiary and procedural rulings of the district court, (4) failure to deal properly with extraneous influences on the jury and (5) errors in the court's charge to the jury. We conclude that the plaintiffs are entitled to a new trial because the verdict was returned by a jury, at least one of whose members had been threatened and assaulted during the trial by a person interested in its outcome. The other contentions of the appellants will be dealt with only as necessary to avoid error at another trial.

THE JURY ISSUE

The jury was not sequestered. Near the end of the trial it was reported to the district judge that one juror had been threatened three times and assaulted on one occasion. The threats were against both the juror and his family, and were related to the verdict in this case. The excerpts from the transcript which are appended hereto describe the problem and the steps taken by the district court.

Several facts require further comment. The district judge never interrogated the threatened juror to learn what effect the incidents had had on him and whether he had discussed the threats with other jurors. When counsel for the plaintiffs requested that such an interrogation take place the court indicated that he would "take care of it" — apparently referring to his tentative decision at that time to excuse the threatened juror. Later the court stated that there was no need even to inquire of the juror since he was going to be excused anyway. In fact, however, the juror was never excused. Instead the entire jury was informed that an attempt had been made to influence its decision in the case, and the jury was eventually sequestered. In addressing the jury the judge referred to the extreme seriousness of the threats and the fact that he had "blood on his hands" because of failure to take a threat seriously at some earlier time. The court did not question the other jurors to determine whether any of them had been ap-

proached or whether the threatened juror had discussed the details of his experience with them.

During the proceedings in chambers from which we have quoted extensively in the appendix the district judge indicated several times that he had decided to excuse the threatened juror. After the court had delivered its charge to the jury counsel for plaintiffs asked if the court had elected not to excuse the threatened juror. The following dialogue occurred:

THE COURT: [4029] I am electing not to excuse that juror.

MR. KELNER: I assume none of the parties know who that juror is?

THE COURT: Not from me, I have refused very adamantly to give anybody the slightest hint.

MR. KELNER: In relation to our responsibility to our clients, I think opposing counsel as well, are there any different facts available to the Court relating to the ability of this juror to fulfill his duties as a juror in deciding the case untrammeled by any further threats or any other details that we have not been provided with?

THE COURT: No. The situation is no different than it was at the time the matter was argued out. I simply took the position, after I reviewed the matter, there were many ways this man could react. He reacted in the proper manner, that is, called for help from the authorities that he could think at the moment for immediate help. If a fellow does that, that's an indication he is conscientiously trying to do the thing the right way.

I have a great belief in jurors and their ability to overcome [4030] any prejudicial things and to outweigh them when they know they have to do it.

I feel, even though he was approached and threatened something was going to happen, being assured that protection was forthcoming, he no longer has to consider that, and I am quite sure that he will be able to put these extraneous things out of his mind and decide the case on the basis of the law and the evidence.

I think it will be rather hard, in many ways, I think Mr. Fulton pointed this out, here is a guy who tried to do the right thing, after going through all the hell of this case, that automatically poisoned his mind and it wasn't his fault. I don't think it automatically poisoned anybody, so I am going to let him go.

[Page numbers refer to Joint Appendix.]

The Supreme Court laid down the following rule in *Mattox v. United States*, 146 U.S. 140, 150 (1892):

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officers in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox was a capital case. However, this rule has been applied in both criminal and civil cases through the years. It does nothing more than establish the most fundamental requirement for successful employment of the jury system — that every litigant may have confidence that his case will be decided solely on the law and the evidence heard in the courtroom. Since trial by jury is guaranteed in both criminal and civil cases by the Sixth and Seventh Amendments to the Constitution, any unauthorized intrusion into the work of a jury is a threat to our entire system of justice.

In *Remmer v. United States*, 347 U.S. 227 (1954), the Court criticized the use of an FBI agent to interrogate a juror who had been approached by a third party during a criminal trial, stating:

The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. *Id.* at 229-30.

After remanding the *Remmer* case for a hearing on whether the incident was harmful to the defendant, the Supreme Court ultimately ordered a new trial upon concluding that the evidence ". . . reveals such a state of facts that neither Mr. Smith [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror." *Remmer v. United States*, 350 U.S. 377, 381 (1956).

It was established in *Remmer, supra*, 347 U.S. at 229, that, at least in criminal cases, any outside contact with a juror about a pending case made during trial, is "presumptively prejudicial," and that the burden of establishing harmlessness "rests heavily" on the government. This presumption has been consistently recognized by this court. In *Stone v. United States*, 113 F.2d 70 (6th Cir. 1940), a case which involved an attempt to bribe a juror, the trial judge first interrogated the juror who had been approached, in chambers with a court reporter recording the proceedings. He then asked the remaining jurors, individually and under oath, whether they had been approached or any unusual events had occurred in connection with their service on the jury. The first juror stated that he had told no one else of the approach, that as far as he knew no other juror had been approached and that he was "open minded" and able to decide the case as if he had not been approached. All the remaining jurors stated that they had not been contacted and that nothing unusual had occurred. Nevertheless, this court held that the presumption of prejudice had not been overcome since there was "no showing on the part of the appellee that no injury *could have occurred* by reason of the irregularity." *Id.* at 77-78 (emphasis added).

More recently we reached the same conclusion in *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973), where the district judge made a commendable effort to avoid a mistrial. Referring to our earlier decision in *Stone, supra*, Judge William E. Miller wrote for the court,

We reversed on the basis that once an improper communication has been made to a juror, there is a presumption that the rights of the defendant are prejudiced. See *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 150, 36 L.Ed. 917 (1892). The burden was on the government to show that no prejudice resulted from the communication. Our insistence on this high standard was necessary, not only to insure that the defendant received a fair trial by impartial jurors, but also to maintain the integrity of the jury system. Inherent in our scheme of justice is the assumption that litigants will have faith in the probity of jury verdicts. Absent such faith the stability on which we depend for the orderly functioning of our legal institutions would be in doubt.

Id. at 971.

The presumption that extraneous communications with jurors are prejudicial has also been applied in civil cases. In *Stiles v. Lawrie*, 211 F.2d 188 (6th Cir. 1954), the judgment in an F.E.L.A. case was reversed for a new trial because the jury considered material which had not been received in evidence. Applying a rebuttable presumption of prejudice the court found that it was impossible for the district judge or the court of appeals to know whether the extraneous material actually influenced the verdict. The test of harmlessness was stated as follows:

Receiving incompetent documents by a jury requires that the verdict be set aside, unless entirely devoid of any proven influence or probability of such influence upon the jury's deliberations or verdict.

Id. at 190 (emphasis added.)

A similar test was enunciated in a civil antitrust action where the district court had held a full hearing on an allegation of extraneous influences on a jury. The court of appeals in *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d

101, 105-06 (5th Cir. 1954), cert. denied, 349 U.S. 961 (1955), concluded:

The solution of this question does not require a positive finding that the jury was actually influenced by what took place; but rather involves a determination as to whether or not it was made reasonably certain that they were not.

We can perceive of no reason to apply a less rigid requirement to this case, where the extraneous influence consisted of threats on the life of a juror and his family, accompanied by a physical assault. The defendants' argument that there is no evidence that the jury was affected by fear or coercion misconceives the established law and ignores the presumption of prejudice. The record is completely barren of any showing that the verdict was not affected by an extremely serious extraneous intrusion. Under these circumstances, the party seeking to avoid a new trial has the burden of showing the entire absence of any influence on the verdict or the probability that such influence existed. *Stiles v. Lawrie, supra*. Counsel for the defendants objected to dismissing the threatened juror and made no request for a hearing which might have thrown further light on the circumstances of the threat and assault and its probable effect on the other jurors.

The cases relied upon by the defendants are readily distinguishable. *Womble v. J. C. Penny Co.*, 431 F.2d 985 (6th Cir. 1970), did not involve an extraneous influence. This was a specific finding of the district court, affirmed by the court of appeals. Under the circumstances of that case there was no abuse of discretion in denying a motion for a new trial. In *Gault v. Poor Sisters of St. Frances*, 375 F.2d 539, 551 (6th Cir. 1967), the court concluded that there was no showing of "extraneous influences brought into the jury room from outside [citing *Mattox, supra*] . . . or any improper approach to or communication with the jury prior to or during the course of its deliberations by some outsider." Similarly, in

Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973), there was a finding of no extraneous influences. Obviously none of these cases provides guidance in the present case, where a most serious extraneous influence was brought to bear on at least one juror. This case is controlled, rather, by the doctrine of *Mattox v. United States, supra*, as applied by this court in civil as well as criminal cases.

The defendants argue that the plaintiffs did not object to the district court's decision to permit the threatened juror to remain on the jury. An examination of the transcript makes it clear that counsel for the plaintiffs repeatedly requested that the threatened juror be excused. Rule 46, Fed. R. Civ. P. provides:

Rule 46.

EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

The transcript reveals that the district judge knew that the plaintiffs had requested that the threatened juror be excused. Furthermore, the trial judge repeatedly indicated that the juror would be excused, and that there would be no point in questioning since he could not be permitted to participate in the deliberations.

Every litigant is entitled to a verdict which is free of improper influences. It was error for the trial court to determine *ex parte* and without any personal interrogation that

a juror who had been threatened and assaulted and told that his home would be blown up could continue to serve, unaffected by these incidents. The threatened juror should have been questioned by the court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors, including the possibility that he had disclosed the way in which his assailant was attempting to cause him to vote. Unless counsel agreed to an *in camera* interrogation, they were entitled to be present and a record should have been made of the proceedings. *Remmer v. United States, supra*, 374 U.S. at 229-30; *United States v. Gay*, 522 F.2d 429, 435 (6th Cir. 1975). Unless the court was completely satisfied after questioning him that there was no probability that the threatened juror would be affected in the performance of his duties, that juror should have been excused. As the court stated in *Stone v. United States, supra*, 113 F.2d at 77, "If a single juror is improperly influenced the verdict is as unfair as if all were." Further, if it appeared that any other jurors had been subjected indirectly to improper influences by reason of their knowledge of the threatened juror's experience the district court would be required to consider declaring a mistrial, lamentable as that would be. See *Briggs v. United States*, 221 F.2d 636, 639 (6th Cir. 1955). Here, no attempt was made to determine whether the remainder of the panel had possibly been contaminated. Instead, they were merely told that efforts had been made to influence one of their number, with alarming references to the extreme seriousness of the threats, and were left to speculate about the entire matter.

We have considered the possibility of remanding for a hearing on the question of whether the unlawful intrusion in this case was harmless, but have concluded that such a hearing would be pointless. If the threatened juror had been questioned immediately after the court was informed of the intrusion the district court might have been able to determine the extent of the probable influence of the incident on him,

and acted accordingly. Likewise, if the remaining jurors had been questioned at that time, a basis would have existed for deciding whether they would probably be influenced. Even when the investigation is made immediately upon learning of an intrusion it is extremely difficult to learn the extent of the extraneous influence upon a jury. This difficulty is compounded if questioning is deferred, since it is not clear that a juror can be questioned after verdict except to determine whether an intrusion has occurred. The courts have not ruled uniformly on the question of whether a juror may be interrogated after a verdict is rendered as to the effect of extraneous influences on him. See e.g., *United States v. Remmer*, 122 F. Supp. 673, 675, n. 4 (D. Nev. 1954); cf. *United States v. Barfield*, 359 F.2d 120, 123 (5th Cir. 1966). This matter is not settled by Rule 606, Fed. R. Ev., since testimony concerning outside influences is treated as an exception to the general rule against a juror impeaching his verdict.

Even if questioning the jurors were permitted on the issue of whether the verdict was affected by the incidents, considering the problem of fading memories and natural reluctance of a juror to admit that he had been improperly influenced, we believe it would be impossible now for either the district judge or this court to conclude that the threat and assault disclosed by this record were harmless. Cf. *Stiles v. Lawrie, supra*, 211 F.2d at 190.

The intrusion in this case represents an attempt to pervert our system of justice at its very heart. No litigant should be required to accept the verdict of a jury which has been subjected to such an intrusion in the absence of a hearing and determination that no probability exists that the jury's deliberations or verdict would be affected. Although we are reluctant to do so, particularly in face of the obvious good faith efforts of the trial judge to deal with a most difficult problem which arose near the conclusion of an exhausting trial, we conclude that reversal for a new trial is required.

FIRST AMENDMENT CLAIMS

The plaintiffs contend that they were entitled to a directed verdict on their claim that the banning and dispersal of the assembly on the Kent State campus at noon on May 4, 1970 violated the right of peaceable assembly. In opening statements to the jury and in colloquy with the district court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2 and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard "because of the violence which had occurred, because it was unexcusable [sic], unjustifiable . . ." It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period.

It is settled that violent demonstrations do not enjoy First Amendment protection. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Nevertheless the plaintiffs contend that an order banning the noon assembly on the campus on May 4, 1970, and attempts to disperse* that assembly before any violence occurred constitute a deprivation of their constitutional right to free expression which is distinct from their

* The actual orders to disperse the May 4th assembly were relayed to the crowd by a Kent State security officer, not by anyone connected with the National Guard. This officer rode back and forth in a jeep in the area where the crowd had gathered and ordered

right not to be deprived of life or liberty without due process of law.

The plaintiffs' argument is based upon the faulty premise that the authorities had no right to ban or disperse the May 4 assembly in advance even though it was uncontradicted that similar group meetings in Kent, Ohio and on the campus of Kent State during the preceding three days had resulted in widespread violence and property damage. In their view "prior restraint" is never justified, and the authorities must always indulge the presumption that the next assembly will be peaceful, no matter how violent the preceding ones have been. That is not the law, particularly in a school or college setting. *Norton v. Discipline Committee of East Tennessee State University*, 419 F.2d 195, 199 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970); *Butts v. Dallas Independent School District*, 436 F.2d 728, 731 (5th Cir. 1971).

The "clear and present danger" test for restricting freedom of expression or association is met when expression is directed to "inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). While confirming the right of students to the freedom of expression guaranteed by the First Amendment, the Supreme Court in *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969), noted this limitation:

But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (citation omitted).

The Court elaborated on *Brandenburg* and *Tinker* in *Healy v. James*, 408 U.S. 169, 188-89 (1972), as follows:

the dispersal, using a bullhorn. Rocks were immediately thrown from the crowd, at least one hitting the officer, and threats and obscenities were shouted at him.

The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (unanimous *per curiam opinion*). See also *Scales v. United States*, 367 U.S., at 230-232; *Noto v. United States*, 367 U.S. 290, 298 (1961); *Yates v. United States*, 354 U.S. 298 (1957). In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School District*, 393 U.S., at 513. Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. (footnote omitted).

We conclude from the uncontradicted evidence of three successive days of violence involving students and other young people that the defendants satisfied the "heavy burden" of justifying their decision to permit no assemblies on the Kent State campus on May 4, 1970. *Healy v. James, supra*, 408 U.S. at 184.

The defendants made a motion for directed verdict on all issues at the conclusion of the plaintiffs' proof, and renewed it at the conclusion of all proof. In view of the uncontradicted evidence that violence accompanied assemblies of students and young people for three consecutive days in Kent and on the campus, finally subsiding at about 3:00 a.m. on May 4th, the order banning assemblies on that day did not violate the First Amendment. *Bright v. Nunn*, 448 F.2d 245, 249 (8th Cir. 1971). The motion for directed verdict on the separate claims for damages for violation of the right of peaceable assembly should have been granted. Upon another trial this claim will not be an issue.

The defendant White, president of Kent State, had no control over the actions of the National Guard. Since his participation in the decision to ban the May 4 assembly did not violate rights of the plaintiffs, there is no theory under which he could have been liable to the plaintiffs. Upon remand the district court will dismiss all claims against this defendant.

INSTRUCTIONS

Upon retrial the evidence and the issues presented may differ from those of the first trial. For this reason the plaintiffs' arguments concerning the jury charge at the first trial will not be considered in detail. However, we call attention to several questions which are likely to be raised concerning instructions at the second trial in order that error may be avoided.

One aspect of the district court's charge appears to conflict with a recent Supreme Court ruling. In the present cases the court instructed the jury that it could find for the plaintiffs under their § 1983 claim if the action of the defendants constituted cruel and unusual punishment as proscribed by the Eighth Amendment. In *Ingraham v. Wright*, — U.S. —, 45 U.S.L.W. 4364 (April 19, 1977), the Court held that the Eighth Amendment was designed to protect those convicted of crimes. Where a state seeks to punish without an adjudication of guilt, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id.* at 4369, n. 40. Upon another trial separate instructions on cruel and unusual punishment should not be given.

The defendants contend that no issues related to "training, weaponry and orders of the Ohio National Guard" should have been submitted to the jury. This argument is based on the Supreme Court's decision in *Gilligan v. Morgan*, 413 U.S. 1 (1973), where questions related to deployment of the Ohio National Guard at Kent State were held to present non-justiciable issues in an action seeking a declaratory judgment and

injunction. In *Scheuer v. Rhodes, supra*, the Court noted the limited holding of that case in the following language:

Gilligan v. Morgan, by no means indicates a contrary result. Indeed, there we specifically noted that we neither held nor implied "that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." 413 U.S., at 11-12. (Footnote omitted.)

416 U.S. at 249.

Article I, § 8, cl. 16 of the Constitution grants to Congress authority "[t]o provide for organizing, arming, and disciplining . . ." the militia and reserves to the states the appointment of officers and authority for training the militia "according to the discipline prescribed by Congress." The Department of the Army, by delegation from Congress, has prescribed rules and regulations pertaining to training, weaponry and orders of the National Guard. There was voluminous evidence in this case from which a comparison could be made between the procedures prescribed by Congress and those ordered and practiced by the Ohio National Guard. It was for the jury to determine whether the Ohio orders and regulations, particularly with respect to use of loaded weapons in dealing with civil disturbances, represented a departure from Army regulations. If such a departure was found to exist, it was a factor to be considered in deciding the ultimate issues of liability in these cases. A justiciable controversy related to training, weaponry and orders was presented.

We have examined the entire charge to the jury and are impressed with the apparent effort of the district court to arrange the issues logically and to present them with clarity. The plaintiffs contend that the charge was "incredibly long and complex." The length and complexity of the instructions resulted, at least in part, from the fact that the plaintiffs sought

damages under several different theories, requiring the court to state the law applicable to each claim separately with regard to each legal theory. The plaintiffs made an eleventh-hour motion to dismiss the pendent state claims with prejudice. Since proof had been completed and the court had distributed proposed instructions which included law related to the pendent claims, this motion was denied. If such a motion is timely made upon remand, the length and complexity of the instructions will be materially reduced.

Numerous specific requests for instructions were covered in the district court's charge, though not in the precise form or language requested. The court is not required to adopt the language of the requesting party if the substance of the requested charges is contained in the instructions actually given. *Womble v. J. C. Penney Co., supra*, 431 F.2d at 988. At the next trial the court will reexamine all requests for instructions in light of the proceedings before it and controlling authority.

OTHER ISSUES

There was sharp conflict in the evidence concerning events after the National Guard began its efforts to disperse the May 4th noon assembly. Neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. Jury issues were presented and it cannot be said that the verdict was not supported by substantial evidence. This is not to intimate any conclusion if a similar contention is raised at the second trial, as the evidence may be materially different.

It is unlikely that the alleged trial errors will occur at another trial. Many questions will be controlled by the Federal Rules of Evidence, which became effective midway through the first trial. The applicability of the Rules will doubtless eliminate some of the controversies over trial rulings which marked the earlier proceedings.

These cases essentially present the question of whether excessive force was employed in attempting to deal with a civil disturbance. Both the due process claims and the pendent state claims are concerned with the basic issue of the appropriateness of the response of state officials and National Guard members to the conditions which existed and developed at the May 4th noon assembly on the Kent State campus. The tragic results of that confrontation are well known. The question of legal liability must still be resolved. With the First and Eighth Amendment claims eliminated the second trial will focus on the decisive issues related to the due process requirements of the Fourteenth Amendment and substantive law of Ohio. That trial should be less complicated and should present more clearly defined issues than the first.

The judgment of the district court is reversed and the consolidated cases are remanded for a new trial consistent with this decision. The plaintiffs will recover their costs on appeal from the defendants other than Robert White. The district court will enter an order dismissing all claims against the defendant Robert White, who will recover his costs on appeal from the plaintiffs.

APPENDIX TO OPINION

[3684]

MORNING SESSION

Wednesday, August 20, 1975

9:13 o'clock a.m.

(THEREUPON, the following proceedings were had in chambers, in the presence of the Court, counsel for the respective parties, and also present were Robert G. Wagner, United States Marshal, and Frederick M. Coleman, United States Attorney:)

THE COURT: . . . [3686] I find that at least one of the jurors has been approached on several occasions and threatened and actually physically assaulted in connection with the threats; threats have been made on his family, if he doesn't bring in a verdict in a certain way.

Now, I think there is still some possibility that, at the present time — this came to a head late last night and since then the Marshal's service has put the man under guard, the FBI is launching an investigation, and we have some hopes, according to Mr. Coleman, that if we can keep this thing quiet enough that the offense may be repeated, and if it were, with the juror under proper surveillance, the offenders can be apprehended.

[3687] . . . I certainly don't want anything that we do to hamper their efforts, because there is nothing more damaging to the justice system than to have people be able to attack the integrity of the judicial process, which is what has been done here.

Now, the thing that is bothersome about this, that we can't solve that problem just by excusing that one juror. The difficulty with doing that is, if these people are really serious, then they will shift their attention to some of the other jurors. We have no way of knowing that they have put out some feelers to the other jurors, but the other jurors may have

not attached any significance to the preliminary approaches. This juror didn't pay attention the first time, it was only when repeated attempts were made and physical assaults were made on him that he thought there was something serious here and reported it to the authorities.

It appears to the United States Attorney and to me that under these circumstances, for the protection of the jurors, I don't [3688] have too much choice but to sequester them, because we don't have enough manpower locally to put all these jurors under guard and their families under guard. So that the only thing we can do is to sequester the jury.

Now, that sequestration of a jury is a serious business and I don't want to do that unless counsel feel that that's the only thing we can do. . . . [C]ertainly we need all to discuss that matter and reach some consensus about it. . . .

• • •

THE COURT: This is the first moment anybody has heard about it. I have only been aware of it for about a half hour.

• • •

MR. KELNER: [3690] [for plaintiffs] . . . Coming back to this matter, Your Honor, may we know anything about the nature of the assault?

The reason I am asking it, sir —

THE COURT: No. The assault consisted that a person who approached this juror and made three approaches to him, on one of those approaches he grabbed the juror and pushed him back against the wall and told him that he better not find his verdict the wrong way from the way he wanted it to be found.

• • •

MR. KELNER: [3692] There is one more point I would like to raise, your Honor, and I am happy I don't know what the person who wanted this juror to vote one way or another, I'm glad I don't know which way it is meant.

Is it possible that that juror, with the normal human impulse to react against one who threatens him and assaults him, would tend to bend over backwards to vote the other way?

In that event, could that juror be properly interrogated by your Honor in the privacy of your chambers in order, perhaps, that would sway him on the proper deliberation from all of the evidence in view of the experience he has had?

I am concerned about that. . . . I don't care whether this juror is for me or against me. If he feels he has been swayed, I want him off.

• • •

THE COURT: [3695] At any rate, gentlemen, we are getting away from the problem with which I am primarily concerned.

The question of the effect on this juror is one that I can address myself to later on. That is not too consequential because we still have two alternates.

The thing that I am concerned with is what we are going to do to protect the rest of the jury.

• • •

MR. BROWN [for defendants] First of all, I assume the Court asked the juror not to discuss this with other jurors, to get them unduly alarmed? [3696]

THE COURT: I haven't spoken to the juror. The Marshal and I think FBI people are speaking to him and I assume they have asked him not to talk about it.

Is that right, Mr. Marshal Wagner?

MARSHAL WAGNER: Yes, sir. That was your desire and I relayed that information to the man.

MR. BROWN: Secondly, I think on the question of sequestration, the Court and counsel should look at what effect this threat had on this man. Obviously it had enough effect that he reported it to the Marshal, the Court or whoever he reported it to.

My basic philosophy is, frankly, that of the Court's. I am opposed to sequestration.

To me, it gives kind of a forced aura to deliberations and I don't like that.

Now, if it is a real, if any juror is in real danger, of course, I would certainly modify my position on that but, if not, I would be opposed to sequestration. [3697]

THE COURT: Well, I, of course, take the position that telephone threats may be one thing, but threats that are communicated face to face — I was trained in the idea that you do not ever take lightly a face-to-face threat.

If a fellow says he is going to kill somebody or somebody is going to kill him — there's at least one person dead because I didn't take such a threat as seriously as that.

MR. BROWN. Was this a death threat to this juror?

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THE COURT: Yes.

MR. BROWN: I did not know that.

• • •

MARSHAL WAGNER: Threatened to blow up the house.

• • •

MR. KELNER: Now, Judge, I would like to know whether you would interrogate this [3698] juror to determine what if any effect this has on his ability to be fair-minded, in view of the fact that the obvious impulse would be for him to lean over backwards against the side that was trying to threaten him?

THE COURT: As I just said, Mr. Kelner, that is a matter that I will take care of and can take care of very easily. That isn't what is concerning and troubling me now.

What I am concerned now about is physically protecting the rest of the jury and physically protecting the integrity of this trial, throughout the remainder of it, and that's the thing that is, frankly, worrying me.

MR. ALLOWAY [for defendants]: Your Honor, I have shifted my thinking a couple of times during the course of this conference, and it just shifted away again. . . . I think if it is a threat as to blowing up a juror's house, the juror isn't going to feel very comfortable at being sequestered while his family is posed with the threat, and I would assume that sequestration [3699] isn't going to solve the problem.

. . . I don't think that sequestration is in any way necessary —to insure a fair and impartial verdict, as far as —

THE COURT: I don't think that is — I agree with you on that. I don't think — that is not what I am worrying about.

MR. ALLOWAY: [3700] I also don't think it is going to help as far as the threats to the jurors are concerned.

If they are threatening to blow up their houses, that is something entirely different and this isn't solved by sequestration.

MR. BLAKEMORE [for defendant White]: . . . I think the test should be that when in doubt you sequester. . . .

MR. ENGDAHL [for plaintiffs]: . . . I think it would be helpful for the rest of us if this is perfectly clear, that we have your specific order that we are not to discuss this matter in the presence of, the existence of this threat, with anyone, including our clients outside this room; is that correct?

THE COURT: That is right. That [3701] is right. Not even with your clients.

• • •

MR. ENGDAHL: And secondly, it does seem to me that the fact that one threat apparently has been made means that we are concerned not only with the particular substance of that one threat but the possibility of threats communicated to other jurors, and that is a risk that I think nothing but sequestration can deal with.

True, this one person may be better at home protecting their house, but that would leave everyone available to any other type of threat, which apparently seems to be a serious risk.

THE COURT: Yes. As I say, it is easy enough to solve the problem of that juror. I could just, I could simply discharge him, and probably in view of all of the circumstances I should, without regard to anything else, but the thing that has disturbed me about that is that once he is gone so that the people who have threatened realize that they have accomplished nothing by that one, if they are as rough as [3702] they have shown themselves to be, are they going to stop there or are they going to go on? Are they going to go on then and pick the next one? That is the thing that I am concerned about and that is why I have turned my thoughts very reluctantly to the matter of a possible sequestration of the jury.

MR. BROWN: Just, Judge, to help me in my thinking, is the threat or threats by one person or by more than one person?

THE COURT: Marshal Wagner, you have more information on that than I do, and can you tell them what you told me about this matter so that counsel can hear what you said about your investigation on it so far?

MARSHAL WAGNER: So far, we do believe there is a witness to the actual assault. Man approached three different times in one day.

MR. BROWN: By one person?

MARSHAL WAGNER: By one person.

MR. BROWN: Well, that isn't quite as bad. Oh, it's bad -

* * *

MR. BROWN: [3703] Were the threats here in the area of the Courthouse or elsewhere?

MARSHAL WAGNER: One, in the area of the Courthouse.

MR. MANDEL [for plaintiffs]: If your Honor please, may I ask Mr. Coleman if he has contacted the FBI and instructed them to make an immediate investigation?

* * *

MR. COLEMAN: Okay. The information, Mr. Mandel, came first to my attention last night.

The facts with respect to the approach to the juror that I received from the agent are not as voluminous as those which Mr. Marshal [3704] has offered us. The agent, when he called me, had done nothing more than talk to this individual, the juror, who called him, and, of course, he was able to make a very limited interview over the telephone.

However, he did learn enough to know that the juror had been approached on two different occasions and he brought it to my attention.

* * *

THE COURT: [3706] . . . I have reached a tentative conclusion that it would be very difficult and also extremely hard on the jurors to put on an immediate order of sequestration.

So that I propose to discuss with the jurors, with counsel present, of course, but in the absence of all the public, that they should make preparations so that when they come back tomorrow morning they will have clothing and toothbrushes and things sufficient for some time and make their necessary family arrangements, and ask them to do that with the utmost of discretion in warning their families.

It is necessary not to tell anybody about this, because as long as they aren't sequestered they are available for threats or action.

[3707] Once we get them in and manage to keep this properly confidential, if we get them in sequestration, then, of course, they are safe. There is no use of making or carrying out threats if they are not going to be able to affect a juror, which they won't be once the jury is sequestered.

MR. KELNER: . . . Are you going to proceed on the assumption that they already know about the threats to that one juror?

I assume they already know about it. Are you going to assume they don't know about the threats, or are you going to discuss the subject of one juror being threatened?

THE COURT: If we reach the conclusion about going into sequestration, I am certainly going to tell the jury the reason why. Otherwise, the jurors might have uncharitable thoughts about it, which wouldn't help them in reaching a fair verdict. I want them to be sure that they understand that I am doing this not because counsel or I don't trust them, but because it appears to me to be essential for their own safety. [3708]

MR. KELNER: I think I would oppose that, Your Honor, for this reason:

I am thinking that might instill a sense of fear in the jury, and following the logic of it, we don't know which side was the subject of being favored by the threats, I think it might instill resentment in the entire jury, whoever threatened that juror wanting to threaten them one way might want the jury to think the other.

MR. BROWN: I am diametrically opposed to Mr. Kelner.

MR. KELNER: I have no way of knowing whether the juror favored one or the other. I don't want to guess at it.

I think, sir, that would certainly cause such a deep resentment, because of the inconvenience that it would be instilling something more powerful than any 10 witnesses that testified in this case.

• • •

MR. BROWN: [3709] I have always been raised that candor is the best way out.

I think the Court can handle this very nicely. He doesn't have to overemphasize the nature of the threats. I would play it down, frankly, if I were the Court.

THE COURT: I am going to.

MR. BROWN: Just to tell the jury that they are being sequestered to insure nobody would be contacted, the Court and counsel have decided it would be best to sequester them.

MR. KELNER: I would offer an alternative proposal for you to consider, Your Honor.

I would offer the suggestion that the jury be told that we are at the conclusion of a very lengthy case with the many factors in it and in the Court's discretion and the Court's judgment, the jury be sequestered.

In many important criminal trials they are sequestered from the first day of the trial. I would be opposed to any discussion of the threats. It is going to magnify it. It may cause fears of retribution concerning their verdict after they go home, after [3710] they are discharged.

I say this is going to infect this jury with an untangible factor that either side can't measure.

I don't think it should be of any discussion, the whole threat business.

• • •

MR. KELNER: [3712] Judge, I'm opposed to that for the reason it is going to infect this entire jury with something that will preoccupy their minds; fears of threats, fears of retribution. It is going to be the subject of gossip in the jury room. They are human, what else are they going to talk about.

• • •
I say, sir, this is going to be a mistake to tell them about the very serious threats about the possibility of danger to their families and their homes.

Your Honor, I think you can take very strong control of this matter by stating to the jury: Now that this case is nearing the end and there are many important factors for you to consider, we are going to sequester you.

I would take exception to anything else that is going to take over the minds of the jury with a factor that is going to be impossible for them to overcome.

The threats are going to be half of the [3713] factors in the scales when they go in to decide this case.

MR. BROWN: . . . I think we have 14 intelligent people up there who will do exactly what the Judge tells them. If

you don't have that belief in the jury system, let's abandon the whole thing.

* * *

THE COURT: . . . [3716] [W]hat I'm going to do, with tremendous reluctance, I am going to sequester this jury and I am going to tell the jury exactly why I am sequestering them.

And I am going to let the chips fall where they may.

With respect to the one juror who has been the object of this matter, I feel that under all of the circumstances that it will be necessary to replace him with an alternate juror for deliberation and that will make him available to you, to the Government, for cooperation.

I shan't advise him of that, however, until I send the jury in to deliberate. In other words, in order that he is being excused at this stage of the game would raise a lot of questions. If the jury appears to be in exactly the same shape and composition as it has been all the way along, that will certainly leave things so that the cooperation you will have, your agents will have a better opportunity to see if they can apprehend the people who [3717] approached him.

* * *

THE COURT: . . . [B]ut for the sake of the integrity of the record, I think I am going to have to excuse him. There is no use of my even inquiring about it, I am just going to have to excuse him when the jury gets ready to deliberate.

MR. BROWN: [3718] Let me take exception to that and state my reasons.

I am opposed to it because I do not feel that the Court has sufficient information that this would or this would not influence his verdict.

More importantly, if it happened once it can easily happen again. . . .

And this has concerned me throughout this trial with only four alternates. . . . Assume we wound up with 11 jurors, then what?

THE COURT: Again, I will cross that bridge when I come to it. . . .

MR. KELNER: [3719] . . . You say you are allowing this juror, who will be excused, to remain until the end of the prooftaking or the end of the summation or just what?

THE COURT: When I am ready to send the jury out to deliberate, at that point he will be let off. Otherwise, the jury will appear just as it has been appearing. No one from the outside will know that he is not going to be going in . . .

* * *

THE COURT: [3720] . . . I am not even going to tell him.

MR. FULTON [for defendants]: If the Court please, I want to join in an exception, because I know of no rule of law that says that merely because someone has received a threat, there have been threats against jurors, that this makes him incapable of being a juror.

We have already lost two jurors in this trial since the start.

. . .

* * *

MR. FULTON: . . . There could well be other threats against other jurors and they have not come forward, just as I am sure there have been other threats against other people in this case who have kept silent and said nothing about it.

. . . [3721] [H]e . . . is being penalized for a purported threat against him when he, himself, has done the very thing we would expect a juror to do if this system is going to work.

. . . [H]ere is a man who says, "I have been threatened, I am willing to tell you the truth, I am here as a juror. Now what happens to me? I am penalized because I have the guts to come forward and say what has happened."

THE COURT: Well, Mr. Fulton, you have raised some thoughts that I hadn't had.

At any rate, since I don't intend to do anything about this

matter for at least two days, the only thing I will say at the present time [3722] is that my decision to sequester is made.

As to what I will do about the particular juror who was threatened, I may, after I have had a chance to give further consideration to the arguments of counsel both pro and con, I will decide whether or not I will let him go in with the jury to deliberate.

MR. BROWN: I certainly endorse everything that Mr. Fulton said.

MR. ALLOWAY: May I express myself as supporting Mr. Fulton?

MR. KELNER: I will take exception to the entire threat situation being disclosed to the entire panel.

[Page numbers refer to Joint Appendix]

EDWARDS, Circuit Judge, concurring. I join fully in Judge Lively's opinion for the court.

However, I also find reversible error in the District Judge's comments to the jury pertaining to the threat to the one juror. It is hard to see how the jury as a whole could fail to feel threatened by the comments made to the jury from the bench. Granting the difficulties of the situation, the language the District Judge employed simply went too far.

In notifying the jury of his intention to sequester them, the District Judge said:

I am very much troubled and disturbed by information that has come to my ears that threats have been made to at least one of your number in an attempt to influence your decision in this case.

I was brought up in an old school that threats of the type that were made are not to be ignored and not to be taken lightly.

There have been times when I have ignored such threats and I have blood on my hands and it is not easy to carry blood on your hands for ignoring things, and I don't propose to have it happen again if I can avoid it.

What I am now saying to you, I must ask you to keep in the very strictest of confidence. You can't keep it in absolute confidence because you are going to have to go home and discuss it with your families at a later point today. But when you do discuss it with them, I think you must emphasize to them that it is of vital importance to them that they do not breathe a word of what you tell them to anybody, under any circumstances whatever.

What I am going to have to do, and I do this with tremendous reluctance, I am going to have to arrange, when you come back tomorrow, for you to bring clothing and things so that you can stay and be under the protection of my Marshals and stay together until this case is finally concluded.

How long that will be, I don't know, because it is go-

ing to take you a long time, I realize, for your deliberations.

But you are going to have to stay and stay under my custody and be kept away entirely from the public until you have reached your decision in the case.

I am sorry about this, but as I say, threats have been made on the lives of one of your number and I have no assurance that we can solve it simply by getting rid of that one.

Maybe some of you others have been threatened and have passed it off or have not even realized, perhaps, it was a threat or an attempt to threaten. But obviously threats become idle once they can no longer be communicated to you.

In other words, there is no need, you can't make a threat if you can't get it through to the person that you expect to be influenced by it. And it is for that reason only that I am taking this step.

I had thought that I would never, under any circumstances, reach a point where I felt that a jury ought to be sequestered. You read it in the paper, it is done very frequently, particularly in criminal trials of great magnitude. I have always felt that, to a considerable extent, an insult to the integrity of the jurors.

I am not now dealing with a matter of your integrity, which I have no doubts about whatever. But I am dealing with threats, as I say, my experience leads me to believe that I ought not simply ignore.

And it is your safety with which I am concerned, not your integrity. I don't worry about your internal integrity, that I have confidence in. I know you can protect that. But I don't have enough Marshals and enough FBI people, agents, to keep you protected as you go about your daily business.

Now, the reason I am not saying that you have got to stay right here and now be under protection now, I think if you do follow my instructions not to breathe a hint of this to anybody, as I say, you will have to tell your fami-

lies because you will have to make arrangements for them to be taken care of, and that sort of thing while you are staying as my unwilling guests. But if we ostensibly go through the same motions that we have been going through, I think that the threateners, whoever they are, will not change their tactics. They will continue to concentrate where they have been concentrating.

As to one of your members, at least, we can provide and will provide around-the-clock protection and surveillance and as a practical matter, also of law enforcement in making such threats, of course, it is a very serious crime.

But people can't be punished for crime unless they can be apprehended, and one of the hardest things in the world is to apprehend stinking cowards who go around making and carrying out threats.

APPENDIX B

[TRANSCRIPT OF DISTRICT COURT'S DENIAL OF CROSS-PETITIONERS' MOTION FOR DIRECTED VERDICT ON FIRST AMENDMENT CLAIM]

[11,997]

MR. BLAKEMORE: Your Honor, for the record, I merely wanted to indicate a reoffering of Defendants' Exhibit YA, which the Court refused.

THE COURT: Well, I am going to stand on my ruling on that.

Now, before we get to the matter of the charge, there are a couple of other matters I want to move on to.

One is the pleading that is headed, "Plaintiffs' motion for directed verdict on the issue of unlawful dispersal."

Fortunately we don't go under the old rules, when both sides move for a directed verdict, that was a waiver of the jury trial as to the issue and the Court then decided it. So I am not stuck on the horns of this dilemma.

I have considered this motion very carefully and, of course, without spending a great deal of time expressing my reasons, I am going to overrule it.

In the first place, I think that there are factual disputes here as to this matter. The statements of the Plaintiffs to the contrary notwithstanding.

[11,998]

There is evidence, that I recall from the record which is not included in their summary of the evidence, their excerpts are in the transcript which certainly bears definitely on the Plaintiffs' contention that up to the time that the order to disperse was given, that this was a peaceful and lawful assembly.

But leaving out those elements, and I make specific reference to the fact that the obvious preparations for battle on the part of members of the group, one does not go to a peaceful assembly prepared for battle, and the fact that there was testimony that the allegedly peaceful assemblers were provided with the missiles which they were brandishing even before an order to disperse had been made. That's a question of fact for the jury. The jury may not believe any of this evidence.

[11,999]

Certainly it does not stand out conspicuously in the record, but as I recall, it was there.

But even the passages that are cited by the Plaintiffs in support of their motion, in two of those there is evidence which, if believed, would require the overruling [sic] of their motion.

Now, the law to me is clear: Before a Court can grant a motion for a directed verdict, the Court has to look at the facts in the light most favorable to the party against whom the motion is directed,

and then, viewed in that light, it has got to say that reasonable minds could not differ with the conclusion adverse to that party.

So, quoting from the testimony of the Defendant [sic] Snyder, and I am quoting not from the original record but from the memorandum that the Plaintiffs filed in support of their motion, there is this language:

"Question: Up to the time the jeep moved out to the Commons, sir, did you see any act of violence from the students at all?

"Answer: Only occasionally.

"Question: Doing what, sir?

"Answer: Throwing rocks." [12,000]

Now, there is another passage, again I am quoting from the Plaintiffs' memorandum, and this is on Page 19 of the memorandum and is apparently an excerpt from the testimony of Defendant William Perkins:

"Question: When you looked at these students, what if anything were they doing when you first arrived?

"Answer: At that time, sir, they were gathering around the bell shouting, obscene gesturing and throwing an occasional few rocks at that time.

"Question: You say they threw rocks before the jeep came out? Is that what

you are telling us?

"Answer: Yes, sir, I am."

Now, I cannot find for the Plaintiffs without ignoring that, on this motion, without ignoring that testimony.

The jury doesn't have to believe it and certainly the further examination, cross-examination of those witnesses, materially weakens what they said, but I can't take the weakened version of it on the motion, I have

[12,001] to take it on its strongest, and on that basis, there are dispute of fact here as to whether there was a lawful assembly.

I also have to take into consideration, as the jury does, that the Court as the finder of fact is not limited to the bald statements of the witnesses, but may withdraw from those statements such inferences as seem reasonable in the light of experience.

So that again, you can't rule on a motion for a directed verdict by taking only what the witnesses have said. You have to take it in the context of the totality of the circumstances and the inferences that experience would direct to be drawn from such inferences.

[12,002] For those reasons I have to find that there are disputed factual issues here, and both the factual and legal issues are of extreme complexity.

The finders of the facts are going to have to do a lot of thinking and arguing and considering before they arrive at the conclusion, but there is another article, one of the exhibits or some of the exhibits which are in evidence, which also have considerable bearing on how all of this matter has to be interpreted.

There are issues in the case involving those exhibits, that is true, but I am talking, I don't know the exhibit number, it's FM19-15, and OPlan 2, and some of those things, which the jury, of course, is going to have to determine whether those are proper and reasonable rules, even though they were established either by the National Guard or by the Department of the Army of the United States.

But if the jury should determine that they were reasonable rules, and for the purpose of ruling on a motion for a directed verdict, I have to take the position that the jury will so determine, those rules indicate that, one,

[12,003]

that the time to commence dispersal of a crowd is not when it has become a riotous mob but when it is starting to assemble.

Those are not issues that I have to decide in this matter except as they apply to this motion, and the jury is going to have to decide them, but for the purpose of this motion I have to decide all those things adversely to the Plaintiffs, and if I do decide those things adversely to the Plaintiffs, then they

have not established that this was a peaceful assembly or that the action to dissolve it was wrong.

So I am, therefore, impelled to and I do overrule the Plaintiffs' motion for a directed verdict on the issue of unlawful dispersal, and the Plaintiffs may have their exceptions as to that.

[TR. p. 11,997 to
12,003, line 18.]

APPENDIX C

In the United States District Court
For the Northern District of Ohio
Eastern Division

Civil No. C 70-544

Arthur Krause, et al.,

Plaintiffs,
vs.

James A. Rhodes, et al.,

Defendants.

[Filed Sept. 26, 1975]

MEMORANDUM AND ORDER

YOUNG, J.:

Plaintiffs have filed an elaborate motion for a new trial on all of the issues in these cases, and also a motion for judgment notwithstanding the verdict upon the issue of unlawful dispersal. The motions are supported by a memorandum, and opposed by memoranda of the defendants generally and of the defendant Rhodes individually.

The motions will be overruled.

While it is this Court's usual practice to give a full analysis and state in detail its reasons for its rulings, the trial of this group of cases has been unique in this Court's experience, and

must necessarily be treated differently than more routine matters. To analyze and rule with particularity upon each of the grounds stated for the plaintiffs' motions would add a great deal of length, but very little, if any, substance to the ruling stated.

Both as to the facts and the law, every single point and element of these cases was disputed. By its various memoranda, and by innumerable oral rulings made during the course of the trial, the Court has stated its reasons for its decisions as to points of law, including all of the points raised by the plaintiffs in these motions. The Court has no stomach to sort out and repeat these rulings.

This Court is satisfied with the correctness of its previous rulings upon the legal issues raised in the plaintiffs' motions, although some of them are very complex, and the law upon them is not well-settled.

However, the law does not exist in a vacuum of facts, and in these cases the factual problems are at least as complex as the legal issues which either govern them or depend upon them for resolution. Again these cases are highly unusual in that every single factual issue involves a complete conflict in the evidence. No one who considered all of the evidence impartially could say that there was an overwhelming weight of the evidence one way or another. It is basic in our law that only a jury can properly determine what evidence is to be believed, and what evidence is not to be believed, and

what credibility is to be given to numerous witnesses. The jury has done that in these cases. It is utterly impossible to say that reasonable minds could come to only one conclusion about the facts in these cases. In the extremely emotional context

[footnote to p.1 appears below]

[p. 2]

of every aspect of this matter, it is more realistic to wonder how reasonable minds could bring themselves to reach any of the almost innumerable conclusions that might have been reached. The collective minds and consciences of three-fourths of the twelve men and women who labored long and tearfully to reach their conclusions cannot be considered as unreasonable, or as being wrong about the verdict which they reached.

The tragic reality of the trial of these cases is that nothing about it, not even the shooting of the plaintiff Lewis by the defendant Shafer, was so simple as the plaintiffs' memorandum suggests. It is not improbable that this episode was the spark that ignited the powder-keg, from one view of the evidence. However that may be, it was, under the law, not to be looked at just from the bald statements of the witnesses, nor the

In conformity with Rule 77 (d)
F.R.C.P. please take notice that the
following order of judgment was entered
in this court on Sept. 26, 1975

Mark Schlachet, Clerk

the photographs which were taken from behind Lewis and looking at Shafer. It was to be looked at through Shafer's eyes as he, and not someone else, saw it that unhappy noon tide. Only a jury could take that look, and every intendment must be taken in favor of what they saw and reported by their verdicts.

This Court believes that the case was fairly tried, that the legal issues were correctly determined and explained to the jury, which understood and followed the Court's instructions, and that the jury's resolution of the factual issues should not be interfered with.

For the reasons stated herein and for good cause appearing, it is

ORDERED that the motions filed by plaintiffs for a new trial and for judgment notwithstanding the verdict should be, and they hereby are, overruled; and it is

FURTHER ORDERED that judgments should be entered upon the verdicts in favor of the defendants, and each of them, and that the defendants should go hence without day [sic], and recover their costs herein expended.

IT IS SO ORDERED.

/s/ Don J. Young
United States District Judge
N.D. Ohio, W. Division
Toledo, Ohio.

Supreme Court, U. S.
FILED

FEB 22 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1022

ARTHUR KRAUSE, *et al.*,
Cross-Petitioners,
v.

JAMES A. RHODES, *et al.*,
Cross-Respondents.

**On Conditional Cross-Petition for a Writ of
Certiorari to the United States Court
of Appeals for the Sixth Circuit**

BRIEF IN OPPOSITION FOR CROSS-RESPONDENTS

WILLIAM J. BROWN,
Attorney General of Ohio
State Office Tower
Columbus, Ohio 43215

CHARLES E. BROWN
BURT FULTON
RICHARD A. WALTZ
N. VICTOR GOODMAN
STEPHEN LEWIS
Attorneys for Cross-Respondents



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QUESTION PRESENTED

Whether the Court of Appeals correctly determined that plaintiffs enjoyed no First Amendment right to engage in a group demonstration, because the evidence "was uncontradicted that similar group meetings * * * during the preceding three days had resulted in wide-spread violence and property damage".

COUNTERSTATEMENT OF THE CASE

The opinion of the Court of Appeals sets forth the facts relevant to the Plaintiffs' First Amendment claims:

"* * * In opening statements to the jury and in colloquy with the District Court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2 and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard 'because of the violence which had occurred, because it was unexcusable [sic], unjustifiable . . .' It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period." (Cross-Petition, page 12a).

The "factual history" contained in plaintiffs' Conditional Cross-Petition contains no challenge to the Court of Appeals' description of the events leading up to the May 4 noon assembly. Instead, plaintiffs rely upon the Matson-Frisina communication, and "contend this ban was an unjustified, overbroad prior restraint on protected First Amendment political expression in a wholly proper place, at a wholly proper time for such activity" (Cross-Petition, page 29).

Plaintiffs exaggerate considerably in characterizing the Matson-Frisina communication as a "regulation".¹ In any event, plaintiffs failed to establish that this document was the cause of any of their injuries. There is no evidence that the decision to prohibit the May 4 assembly was based thereon or was the continuation of a previously instituted ban. On the contrary, the record shows that it was a consensus opinion of those officials present at the 10:00 a.m. May 4th meeting that this particular assembly should not be permitted, based on their experience with prior assemblies and the resulting violence.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals held that defendants satisfied the "heavy burden" of justifying their decision to permit no assemblies on the Kent State campus on May 4, 1970. In so doing, the Court of Appeals applied the correct and most liberal standard as articulated in *Healy v. James*, 408 U.S. 169, and the conclusion that that standard was satisfied was clearly correct. Petitioners' contention—"that the authorities had no right to ban or disperse the May 4 assembly in advance even though it was uncontradicted that similar group meetings in Kent, Ohio and on the campus of Kent State during the preceding days had resulted in widespread violence and property damage" (Cross-Petition, page 13a)—would be too insubstantial to warrant this Court's attention even as a matter of first

¹ Plaintiffs contend that the Matson-Frisina communication is "the regulation promulgated by the Governor of Ohio, the Ohio National Guard and Kent State University officials. (Cross-Petition, page 5). Plaintiffs' own recitation of facts clearly shows that the letter was drafted by Robert Matson, Kent State Vice President for Student Affairs, on May 3, 1970, after Governor Rhodes left the City of Kent. Matson labeled his letter "a special message to the University community". There is no evidence that any of the defendants authorized or ordered the letter to be prepared, participated in drafting the letter, or approved or reviewed the letter.

impression. But the contention is not novel. A like First Amendment argument was made and rejected in *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287:

"The question which thus emerges, is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

The starting point is Thornhill's Case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for 'publicizing, without annoyance or threat of any kind, the facts of a labor dispute.' 310 U.S. 100. * * * The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the working-man's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert

force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." 312 U.S. at 292-293.

So here, in considering whether to permit a campus assembly of students, the responsible authorities were entitled--indeed compelled--to consider that similar rallies in the past three days had led to "disturbances in the City of Kent and the burning, by a few people, of the ROTC Building on campus". (Cross-Petition, page 29). Under *Meadowmoor*, and as a matter of elementary common sense, the First Amendment did not require the defendants to risk further injury to persons or property by permitting another assembly so "enmeshed with contemporaneously violent conduct", 312 U.S. at 292.

2. Tacitly recognizing that their attack on the Court of Appeals' reasoning cannot be successfully maintained, plaintiffs advance a new argument—that the Matson-Frisina communication was an unconstitutionally overbroad infringement on their right of peaceable assembly. But this argument was not presented in plaintiffs' appeal to the Court of Appeals. What was said last Term in *Miree v. DeKalb County*, 433 U.S. 25, 33-34, is therefore very much in point:

"The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it."

See also, e.g., *Adickes v. Kress & Co.*, 398 U.S. 144, 146, n.2 and cases cited *id.*; *United States v. Ortiz*, 422 U.S. 891, 898.

There are two additional reasons why there is no genuine "overbreadth" issue before the Court. First, plaintiffs have failed to establish that the Matson-Frisina communication was a cause of the injuries they suffered. On the contrary, as we observed in the Counterstatement, the evidence shows that the decision to ban the May 4 rally was reached independently of that communication or of any general policy; it was a decision pertaining to this particular rally, based on the situation as it then appeared. Under ordinary principles of tort law, plaintiffs cannot recover for injuries which were not proximately caused by the assertedly unconstitutional communication.

Second, contrary to plaintiffs' label, the Matson-Frisina communication on which this argument rests is not a "regulation" (Cross-Petition, page 5), and there is no evidence that it was prepared or even authorized by any of the defendants. See p. 3, *supra*. In any event, it was limited by its own terms to the campus and City of Kent and to the period of emergency; thus tailored to the same situation which justified the ban of the May 4 assembly, it was, therefore, not "overbroad". Plaintiffs take the Court of Appeals to task for failing to answer the question, "was the restraint the only alternative, or was a narrower restraint possible?" (Cross-Petition, page 32). Yet, plaintiffs even now fail to formulate a "narrower restraint" which would have satisfied what they take to be the constitutional requirements, but yet would not have risked further "violence and vandalism." (Cross-Petition, page 12a).

CONCLUSION

For the above reasons, the plaintiffs' Conditional Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN,
Attorney General of Ohio
State Office Tower
Columbus, Ohio 43215

CHARLES E. BROWN
BURT FULTON
RICHARD A. WALTZ
N. VICTOR GOODMAN
STEPHEN LEWIS
Attorneys for Cross-Respondents